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No. 78-15

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Claims (Pet. App. C) is not yet reported. The valuation opinion of the Indian Claims Commission (Pet. App. D) is reported at 39 Ind. Cl. Comm. 383.

JURISDICTION

The order of the Court of Claims was entered on April 4, 1978. The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission abused its discretion in measuring petitioner's damages by the fair market value of the land petitioner lost as a result of the government's failure to deal fairly and honorably.

2. Whether the Indian Claims Commission's damage award was supported by substantial evidence.

STATUTE INVOLVED

Sections 2 and 20(b), (c) of the Indian Claims Commission Act, 60 Stat. 1050, 1054, 25 U.S.C. 70a and 70s(b), (c), are reprinted in Pet. App. G.

STATEMENT

Petitioner brought this action before the Indian Claims Commission pursuant to Section 2(5) of the Indian Claims Commission Act, 25 U.S.C. 70a(5), which authorizes the Commission to hear claims against the United States by American Indians "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Petitioner sought to recover the value of Creek Nation lands that the government had erroneously allotted in 1907 to persons who were not members of the Creek Nation (see Pet. App. 1a-12a). In an order issued December 14, 1970, the Commission held that the United States had violated its obligation to act fairly and honorably toward petitioner by refusing to give petitioner copies of the government-approved rolls of Creek citizens and by failing to take reasonable precautions to prevent erroneous enrollments (Pet. App. 79a-111a). Accordingly, the Commission ordered that the case proceed to a determination of the damages, if any, suffered by petitioner as a result of the government's breach of its obligations.

In the damages trial, the parties stipulated that 142 allotments, representing 212 separate tracts totalling 22,737.21 acres, had been made to persons erroneously enrolled as members of the Creek Nation (Pet. App. 27a-28a). The Commission concluded that the proper measure of the damages to petitioner was the fair market value of these tracts as of March 4, 1907, the date the Creek Nation rolls on which the allotments were based became final (Pet. App. 30a-33a).[1] Applying this standard, the Commission found that the aggregate value of the land for surface uses was $430,324.65, an average of $18.92 per acre (Pet. App. 38a). In addition, the Commission found that the value of the lands was enhanced by the possibility that they included deposits of minerals known in 1907 to be present in this geographic area. It added an increment of $110,000 for known and potential coal deposits on the lands, and an increment of $550,000 for known and potential oil and gas deposits (Pet. App. 38a-50a). The Commission thus held that petitioner was entitled to total damages of $1,115,706.20 (Pet. App. 50a).

On appeal, the Court of Claims affirmed, holding that the Commission had not abused its discretion in determining the measure of damages and that its award was supported by substantial evidence on the record as a whole (Pet. App. 22a-26a).

ARGUMENT

1. Petitioner contends (Pet. 10-15) that the Commission erred in measuring its damages by the fair market value of the erroneously allotted lands at the date the Creek Nation rolls became final. Petitioner urges that it was also entitled to compensation for the loss of the royalties that were actually paid on the oil and gas produced from these lands in subsequent years.[2]

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[1] Additionally, in some cases the enrollees were paid small sums of "equalization money" if the estimated value of the land allotted to them was less than $1,040.00; the Commission found the government liable for $25,381.55 it paid to persons erroneously enrolled (Pet. App. 33a). That award is not at issue here.

[2] No issue is raised regarding the Commission's determination that the value of petitioner's lands was enhanced by $110,000 because of the possible presence of coal (Pet. 6 n. *).

This contention is without merit. The traditional measure of damages in both federal eminent domain proceedings and Indian claims cases is the fair market value of the property at the date the claimant lost title. *E.g., Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474; *Pillager Bands of Chippewa Indians* v. *United States*, 428 F. 2d 1274, 1276 (Ct. Cl.); *Nooksack Tribe* v. *United States*, 162 Ct. Cl. 712, 718, certiorari denied, 375 U.S. 993.

Petitioner contends (Pet. 10-12) that under *Seminole Nation* v. *United States*, 492 F. 2d 811 (Ct. Cl.), the Commission is also required to award damages for lost income when there has been a breach of the government's duty of fair and honorable dealings. But, as the Court of Claims pointed out (Pet. App. 23a-24a), its decision in *Seminole Nation* did not reject the fair market value measure or require the Commission to employ any particular measure in determining damages. The court there stated (492 F. 2d at 821):

> The United States is properly liable, under the fair and honorable dealings clause, for the monetary damage suffered by appellant through this statute. *We leave to the Commission on remand to determine the appropriate compensation—whether it should be fair value as of the date of vesting in the towns and cities, the rents and profits derived from the lands, a combination of both standards, or some other measure.* [Emphasis added; footnote omitted.][3]

[3]Petitioner urges (Pet. 12-13) that the Commission awarded damages including lost income in *Makah Tribe* v. *United States*, 40 Ind. Cl. Comm. 131. However, as the Court of Claims observed (Pet. App. 24a), in *Makah* the government's breach of its duty of fair and honorable dealings did not involve a loss of land, but rather breach of the government's promises to aid the Tribe in fishing and maritime activities. As the court concluded (*ibid.*), the Commission's failure to follow *Makah* in this case, where the government's conduct resulted in the loss of title to land, was not an abuse of discretion. Similarly, petitioner's argument (Pet. 14-15) that under general trust law a beneficiary can recover lost income for a breach of fiduciary duties does not establish that the Commission abused its discretion by failing to apply an analogous rule to the facts of this case.

2. Petitioner also contends (Pet. 9, 16-21) that the Commission's findings are not supported by the record.[4] Petitioner urges that the Commission ignored the soil surveys prepared by the Department of Agriculture and the testimony of petitioner's appraiser (Pet. 16-18), and that the Commission's reliance on evidence of actual sales of Creek Nation lands was erroneous because those sales were based on improperly low appraisals (Pet. 20). Additionally, petitioner argues (Pet. 20) that the Commission failed to take account of cash bonuses paid for leasing rights on similar lands.

As the Court of Claims correctly recognized (Pet. App. 25a), even if the record includes evidence that might justify a higher award, the Commission's determination must be affirmed as long as it is supported by substantial evidence on the record as a whole. *Iowa Tribe of Iowa*

[4]Petitioner states that the Commission made inconsistent findings that the land would not have been allotted it it were known to contain minerals, and that federal officials knew there was oil on the Creek Nation land (Pet. 19-20). This argument is frivolous. The Commission observed (Pet. App. 53a, 29a) that no effort was made to appraise the mineral values of the land at the time of allotment because "the land would not have been allotted had it been known that there were minerals beneath the surface," inasmuch as "[i]t was, *in theory*, the policy of the Department of the Interior to hold mineral lands for the benefit of all members of the tribe" (emphasis added). This explanation of why the commission charged with appraising the lands failed to appraise their mineral value is in no way inconsistent with the Commission's finding (Pet. App. 62a)—with which petitioner agrees—that at the time of the allotments it was known the some Creek Nation lands overlay mineral deposits.

Reservation v. *United States*, 195 Ct. Cl. 365, 368-369, certiorari denied, 404 U.S. 1017; *Sac & Fox Tribe of Indians of Oklahoma* v. *United States*, 315 F. 2d 896, 906 (Ct. Cl.), certiorari denied, 375 U.S. 921.

The record contains ample support for the Commission's finding of the fair market value of the land. The Commission relied on evidence of 30 actual sales of Creek Nation tracts between 1906 and 1907, at an average price of $18.42 per acre; on 39 contemporaneous appraisals by the United States Indian Agent at Muskogee, which averaged $13.67 per acre; and on 50 appraisals and sales during 1906, at an average appraisal of $15.52 per acre and an average sale price of $18.58 per acre (Pet. App. 35a-36a). The Commission also relied on the 1910 Federal Census appraisal of $23.00 per acre for farm land in the counties where the tracts in question were located (*ibid.*). Finally, the government's appraiser testified that the fair market value in 1907 was $21.95 per acre (Pet. App. 36a-37a). Accordingly, although petitioner presented some evidence that would have supported a higher award, the Commission's determination of the surface value of the lands was supported by substantial evidence on the record as a whole.

The evidence of the enhancement due to the possible mineral deposits was also conflicting, but the record contains substantial evidence supporting the Commission's award. There was evidence that the average value of oil leases at the date of valuation was $25.00 per acre, and the Commission concluded (Pet. App. 49a-50a) that this evidence provided the "most reliable basis" for determining the value of the possible mineral deposits. The Commission reasonably determined that bonuses for oil leases were not paid with enough regularity to be a significant factor in determining the value of the lands (Pet. App. 49a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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